IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.629 OF 2001

Vijay Pralhad Warbuvan]
C-11883,]
Presently undergoing sentence]
at Yerwada Central Prison,Pune.] .. Appellant

versus

1. The Senior Inspector of Police]
Trombay Police Station]
2. State of Maharashtra] .. Respondents.

WITH

CRIMINAL APPEAL NO.630 OF 2001

ALONG WITH

CIMINAL APPLICATION NO.5847 OF 2005

Amteesh Subashchandra Rai]
C-11884,]
Presently undergoing sentence]
at Yerwada Central Prison,Pune.] .. Appellant

versus

1. The Senior Inspector of Police]
Trombay Police Station]

2. State of Maharashtra] .. Respondents.

WITH

CRIMINAL APPEAL NO.631 OF 2001

Anand Omprakash Sharma,]
aged about 25 years, student]
resident of Row House No.3,]
Plot No.26, Sector No.3,]
New Panvel Pin Code 410 2006]
(Present lodged as Convict]
Prisoner No.11885, Circle No.1] .. Appellant
Barrack No.6, Yerwada Central] (Original
Prison, Pune 411 006.] Accused No.3)

versus

1. The Senior Inspector of Police]
Trombay Police Station 400088]
2. State of Maharashtra]
C/o The Public Prosecutor]
High Court, Bombay.] .. Respondents.

Mr.R.B.Mokashi with Mr.Sameer Vaidya for the Appellants - Original Accused Nos. 1 and 2.

Mr.Clive D'Souza for the Appellant - Original Accused No.3.

Mrs.G.P.Mulekar, APP, for the State/respondents.

CORAM : D.G.DESHPANDE
SMT.R.S.DALVI, JJ.
DATED : JANUARY 23, 2007.

COMMON JUDGMENT [PER D.G.DESHPANDE,J.]

1. All the three accused, who have filed their respective appeals, have been convicted by the Additional Sessions Judge, Greater Bombay, by his judgment dated 2nd March 2001 for the offences punishable under Sections 363, 366 and 376 (2)(g) of the Indian Penal Code and, sentenced to suffer seven years R.I., ten years R.I. and life imprisonment along with fine of Rs.10,000/- each. All the substantive sentences to run concurrently.

2. Victim girl of gang rape is a convent (i.e. English Medium School) going girl of about 11 years by name "X" (We are not disclosing her name in the judgment). She is P.W.No.2. According to the prosecution, this victim girl

used to attend tuition classes at the house of one Sangita where these three accused were teaching as teachers. [These accused were also studying at the relevant time in the colleges]. The date of the incident is 9th September 1997. On that day, in the Community Hall, situated at NAD Colony, Mankhurd, Ganapati was installed. It was the 4th day after installation of Ganapati. The victim girl along with her three friends, in the evening, had gone there to have a Darshan of Ganapati. At that time, the accused came there. They had belts in their hands. Therefore, three friends of the victim girl got frightened and they ran away. The victim girl could not run away because she had an injury to her right leg, because of beating given by accused Vijay in the tuition class. Then all these three accused caught hold of her and in open passage of veranda adjoining to Community Hall they committed rape upon her and then they left giving threats to her.

3. The victim girl went to her house. It was night time. She did not disclose the incident to her mother. Next day she was taken to Kalamboli which is at a distance of two hours

by bus from the residential place of victim girl. The victim girl was complaining of stomach pain. She was given paracetamol medicine. Soframycin was also applied to her. At Kalamboli initially the victim girl did not tell anything to her maternal aunt. But later on the victim girl confined to her aunt about the rape committed by all the accused. Next day the aunt (PW 1) brought the victim girl and her two brothers to their house at Mankhurd where the mother of victim girl was informed about the incident of rape. Then thereafter the victim girl was taken by the mother and aunt to Municipal Dispensary of Chitta Camp where the mother (PW 6) was employed. The doctors were informed about this incident. But Dr.Sharmila and Dr.Jyoti told them that since this was a police case, the victim girl should be taken to some big hospital or Shatabdhi Hospital and lodge a complaint with Trombay Police Station.

4. But P.W.1 and P.W.6 did not do either of this and on 11.09.1997 they took the victim girl to a private doctor by name Dr.Shivani at Chembur. Dr. Shivani also gave same advice. Then P.W.1, P.W.6 and the victim girl went to

Trombay Police Station and lodged a complaint. Offence of gang rape was registered against these three accused. The police went with the victim girl to the spot and prepared spot panchanama. The accused were arrested and thereafter on 12.9.1997 the victim girl was sent to Nagpada Police Hospital for medical examination. There Dr.Kelwekar examined the victim girl and submitted his reports of attempting sexual intercourse. The accused were sent for their medical examination. Their blood and blood of the victim girl was collected and sent to the Chemical Analyser.

5. The clothes of accused were seized under panchanama. They were packed, labelled and sealed, and sent to the Chemical Analyser along with the clothes of victim girl. Those clothes were handed over to the police by the mother of victim girl on 13.09.1997. The statements of witnesses were recorded by P.W.9 including the statements of mother, aunt, Dr.Sharmila, and Dr.Jyoti. Attempts were made to record the statements of witnesses from NAD colony. But nobody came forward. Thereafter charge sheet came to be filed and the accused were made to

face trial.

6. The defence of accused was of total denial and false implication.

7. The prosecution examined ten witnesses which included Savita-(PW.1)-Maternal Aunt (Mausi) of victim girl; PW.2-the victim girl ‘X’; PW.3-Dr.Vijay Kelwekar who examined the victim girl with reference to her alleged rape by the accused persons; PW.4-DR.Jyoti Atre; PW.5-Subhan Kashim, the Panch regarding clothes of accused No.1; PW.6- Mother of victim girl; P.W.7-Maternal uncle of victim girl; PW.8 PSI Manoj Jadhav-the IO.; PW.9 API Shivaji Birajdar the IInd IO.; PW.10 PI Ram Gajare the IIIrd IO.

. Number of documents were brought on record, witnesses were examined at length, parties were heard at the end of trial and, the trial Court found that the accused were guilty of gang rape and, therefore, the trial Court convicted and sentenced the accused as stated above. Hence these three appeals.

8. We heard the arguments on 29.11.2006 and on 13.12.2006. During the course of arguments, all the advocates for the accused requested that it would be better if the Court visits the spot. The learned APP also supported that prayer. And, therefore, We visited the spot on 07.12.2006. Rough sketch map of the scene of offence (the Community Hall) was prepared by one of us. It was shown to the learned advocate for the accused and the APP. They agreed it to be correct and therefore that map or sketch would be forming part of the judgment.

9. Even though there are three advocates for three different accused, learned advocate Mr.Mokashi made all his submissions covering the case of all the accused and he was supported by the remaining advocates with addition to certain points of their own case. Learned Advocate Mr.Clive D'D'Souza argued at lenght for Accused No.3. We are considering all those submissions.

10. According to Mr.Mokashi, leaving aside the question as to why a girl of 11 years of age should falsely implicate these accused in such a heinous crime, the prosecution story was totally

and completely improbable and impossible and therefore question of false implication in such cases should not be dominating factor to decide. He contended that if the case is found to be false, improbable and impossible upon appreciation of evidence, then question as to motive behind false implication did not assume much importance.

11. In support of his contention he relied upon number of factors. Admittedly, there are no eye witnesses to the incident. But this, according to Mr.Mokashi is a strong impossibility or improbability, as has appeared in the evidence, the community hall is a hall in NAD Colony at Chembur. In that colony there are 25 to 30 buildings. In each building there are 4/5 flats all occupied by the residents. This community hall is in the centre of the colony. The Ganapati festival had started on 6th September 1997. It was Sarvajanik Ganapati, and not privately installed, where cultural programs were being held daily.

12. In the open area around the community hall the boys and girls used to play cricket and

other games. The time of the alleged rape is 18 hours on 9th September 1997. The alleged rape was committed in the open passage of veranda of community hall and, therefore, it was impossible firstly that there would be a gang rape at such a place which was supposed to be frequented by people because of Ganapati festival. He also argued that in the community hall there were bound to be other persons from the management looking after the idol of Ganapati and, therefore, the story of gang rape on the face of it appears to be improbable.

13. Mr.Mokashi also urged that the open passage of veranda of community hall, where the gang rape was alleged to have taken place, is just abutting the main hall which was about 40 ft. wide and 80 ft. length and the passage was Four and half ft wide and 80 ft. in length. The spot at which the rape was alleged to have taken place was just outside the window in the hall of the size of 5 ft x 4 ft. with a big door just adjacent to veranda with one side wall of 3 ft. 6 inches and the wall of the hall on the other side. Therefore, according to him, if at such a time and place three persons committed rape upon

a young girl, the story was inherently improbable and impossible.

14. In fact, Mr.Mokashi and Mr.D'Souza have taken us through the entire evidence and commented upon it extensively. We can deal with those aspects at a proper place. But we are reproducing their main submissions.

15. Another important submissions of Mr.Mokashi was that the victim girl was a convent educated girl, she was quite capable of understanding as to what the accused are doing, she had shown courage to show to the trial Court her position at the time of rape by actual demonstration, but even then she was assertive of the fact that the alleged rape was committed upon her by the accused and if that evidence is accepted, then it is not a case of rape at all.

16. According to Mr.Mokashi, the theory of gang rape was not at all supported by the medical evidence. Dr.Kelwekar, who had seen and examined the victim girl, did not find any injury on the body of the victim girl. There were no injuries

on her back or any part of her body excepting small bruise on her private part. Our attention was drawn by Mr.Mokashi to the evidence of Dr.Kelwekar wherein the doctor has admitted that if the rape i.e. the forcible intercourse was committed upon a girl of 11 years then the injuries like rupture of hymen, bleeding through the hymenal tear, tears in perinium, broaden the gait and pain and lastly swollen of labia majora are possible, and if the girl of such a age was raped by three persons, the injuries would be much more than the aforesaid injuries. Mr.Mokashi also pointed out that Dr.Kelwekar has admitted that all these injuries were absent when he examined the victim girl accordingly.

17. Mr.Mokashi also contended that absence of any corresponding injuries indicating use of force and violence by three accused on the body of victim girl, absence of any tearing of her clothes, absence of blood stains or semen on her clothes, absence of blood or semen or vaginal discharge on the clothes of the accused and absence of any injury on the persons of any of the accused also was sufficient and strong enough to create doubt about the story of gang rape.

18. Mr.Mokashi then contended that there was delay in lodging the FIR. However, he conceded that in rape cases delay was an usual occurrence. The other aspect, that was strongly critisized by the advocate for the accused, was that even though according to the victim girl, she was accompanied by three of her friends, when she went to the community hall, at that time and on that day of incident, the I.O. did not record the statement of any of those witnesses. That, according to Mr.Mokashi, was a very serious lapse sufficient to doubt the entire story of the prosecution. He also pointed out that the IO did not record any statements of the persons looking after the celebration of installation of Ganapati in the community hall and also the persons who had visited that hall on that day and at the relevant time and, similarly no statement of any of the persons belonging to the management of Sarvajanik Ganeshotsav Mandal was recorded. Further not recording of any statement of any of the occupants of the adjoining building was also a serious lapse on the part of the prosecution.

19. Coming to the actual evidence of the

victim girl in Court, Mr.Mokashi contended that there were not less than 25 to 30 omissions and contradictions in her evidence with reference to her FIR and most of these contradictions and omissions were material and, this affects seriously the credibility of the victim girl.

20. Mr.Mokashi also made submission with reference to his arguments that this could not be a case of gang rape by three accused, with reference to structure, weight and height of each of the accused and that of the girl. Most important contradiction and omission of the victim girl is with reference to the manner in which she was raped. In the FIR she has stated that she was made to lie down on the ground and then three accused raped her in succession, whereas before the Court she has stated that the accused raped her while she was standing in the open passage of the Veranda adjoining to the community hall. We will deal with that aspect of contradictions at length separately because there are too many contradictions and omissions which cannot be summarised in the submissions being recorded of the advocates.

21. Mr.Mokashi also urged that admittedly, P.W.1 - the Aunt (Mousi) and P.W.6 - the mother of the victim girl are not the eye witnesses of the incident. But they are the witnesses to whom the victim girl made disclosure of the incident of rape upon her. He pointed out from their evidence that from the time of rape i.e. 9/9/97 till lodging of FIR on 11/9/97 around midnight, there was no reason for the victim girl not to disclose the incident and there was no explanation why there was inordinate delay. He also contended that the IO did not give any satisfactory explanation why he did not send the victim girl immediately for medical examination, but waited till next day morning.

22. Mr.Mokashi also contended that according to the version of victim girl, given in the court, the incident lasted about one hour. According to him, even if the concession is given to the victim girl, having regard to her age, about the time factor, in any case it was not less than 20 to 25 minutes and, then in that case it was highly impossible and improbable that not a single soul turned in the community hall to take Darshan of Ganapati or nobody, who were

present in the community hall, noticed the rape being committed upon the victim girl in the veranda of community hall. Mr.Mokashi also contended that the victim girl admitted in the Court that she understood the difference between toilet portion of the body and bathroom portion of the body. But even then repeatedly she asserted that the so called alleged rape was committed by the accused with reference to toilet portion of her body. This according to Mr.Mokashi is a serious circumstance creating doubt about the case of the prosecution.

23. On the other hand, the learned APP Mrs.Mulekar, appearing for the State/respondents, contended that rupture of hymen is not necessary in all cases of rape and there is a judgment of the Apex Court that in every case of rape there need not be evidence of rapture of hymen. She then contended that there was no explanation from the defence as to why the victim girl, her aunt and mother would go to the extent of falsely implicating the accused in such a heinous crime. The next contention of the learned APP was that Ganapati installed in the community hall, though was of sarvajanik Mandal, the locality was

limited to NAD colony and it was not necessary that the community hall was flooded with people. Therefore, according to her, absence of independent witness could not be a circumstance to be taken in favour of the accused. Regarding non-examination of three friends of the victim girl and persons from the community hall who were looking after the management of Ganapati festival, she contended that the IO has given explanation that the witnesses were reluctant to come forward and, the three friends of the victim girl had disclosed that they were not knowing anything about the incident. Therefore, according to her, not recording statements of those witnesses and their non-examination did not matter.

24. Regarding absence of injuries on other parts of the body of victim girl and on the persons of accused, Mrs.Mulekar, the learned APP contended that it is not that in every case there should be injuries on the persons of the accused and victim. It depends upon the resistance put forth by the victim and the force applied by the accused and, if that is not there, then there is no possibility of any other injury on the person.

She also contended that the structure, weight and height of each of the accused and that of the victim girl did not relevance in case of rape, because any human being could commit rape on any woman.

25. Regarding delay of about 56 hours in lodging the FIR and delay of 72 hours in sending the victim girl for medical examination, the learned APP contended that women are reluctant to go immediately to the police in rape cases and, therefore, the delay on both the counts was required to be considered as reasonable and justified.

26. Regarding omissions and contradictions in the evidence of P.W.2, in particularly, and in the evidence of other witnesses i.e. P.W.1 and P.W.6, the learned APP contended that those contradictions and omissions did not materially affect the story given by the witnesses and, therefore, this was not a case where any benefit could be given to the accused. Therefore, according to her, the prosecution had proved its case beyond reasonable doubt and the accused were rightly convicted and sentenced by the trial

Court.

27. It was one of the main contentions of Mr.Mokashi, the advocate for the accused, that the testimony of victim girl ‘X’ (PW 2) becomes highly doubtful and suspicious because of multiple contradictions and omissions on the vital aspects of prosecution case. So far as contradictions are concerned, they have been numbered by the this Court from A to I i.e. 9 contradictions are there and omissions are also many.

28. It would be necessary to consider what are the important omissions in the evidence of P.W.2. If all the minor omissions and major omissions are considered, they may be more than two dozen. But we are noting down the major omissions. These omissions are with reference to positive assertion in the Court and absence of that part in the FIR or in the statement of victim girl (PW 2) recorded by the police. So We are noting down what is stated by her in the Court but absent in the police statement.

1. The names of Bhushan, Sagar and Prerana

with whom the victim girl had gone to the community hall are **absent.**

2. In the community hall there was nobody when the victim girl went with her friends is **absent.**

3. When the victim girl was leaving the community hall she saw the accused persons entering the hall is **absent.**

4. The fact that all the three accused had belts in their hands is **absent.**

5. The fact that when the victim girl came after seeing Ganapati they were playing outside and at that time the accused came there is **absent.**

6. The fact that the victim girl was left all alone behind while running away and others had already left and she started shouting and at that time Vijay threatened her is **absent.**

7. The fact that the victim started shouting as the accused were coming with their belts is **absent.**

8. The fact that the accused caught hold of her in the community hall itself is **absent.**

9. The fact that accused Vijay had assaulted her on her legs two days prior to the incident and that she could not run because of that injury on her legs is **absent.**

10. The fact that while she was standing position at the wall, the incident of rape took place is **absent.**

11. The fact that after the incident the accused persons put frock and underwear on her person is **absent.**

12. The fact that the accused persons left the victim half way to the home and

threatened her that if she tells the incident to anybody they would kill her Mama and Mousi is **absent.**

13. The fact that the victim had stomach pain and her Mousi (PW 1) gave her paracetamol is **absent.**

14. The fact that the victim told her mother about the incident on the way to the hospital is **absent.**

15. The fact that all the accused lifted her, took her away behind the wall and removed her frock is **absent.**

16. The fact that Vijay was in front and Amitesh and Anand were standing behind is **absent.** [This is with reference to the actual incident of rape]

17. The fact that when Amitesh did the act upon victim, Vijay and Anand were standing behind is **absent.**

18. The fact that when Anand did the act,

Vijay and Amitesh were standing behind is **absent.**

19. The fact that all the accused persons raped her while victim was standing and as demonstrated by her in the Court is **absent.**

There are other omissions regarding narration given by victim girl about the incident to her Mousi and mother and regarding other aspects, but in our opinion, they are not material and hence We are not reproducing them.

29. Now following are the contradictions A to I in the FIR given by the victim. These contradictions are the statements which the victim girl denied to being made to the police in her FIR.

A. After seeing Ganapati, the witness with friends came out and when they were playing, the accused persons came there.

B. Vijay, after putting her down on the floor with one hand gagged her mouth is

not correct.

C. On the next day, she had gone to school is not true.

D. Vijay threatened her that if she discloses the incident to anybody he would kill her and, therefore, she did not tell the incident to anybody.

E. Next day when the victim girl and her Mousi went to the house of victim girl, the mother of victim girl had gone for work and on her return, Mousi told her everything about the incident.

F. The accused persons went away after the incident to play cricket near the Bawadi.

G. When the victim tried to shout loudly at that time accused Vijay gagged her mouth, lifted her, took her to the Bawadi (i.e. the well) near community hall and threatened her that if she shouts, he will throw her in the Bawadi and while gagging her mouth brought her to the

veranda by side of community hall.

H. Vijay alone removed her frock and he alone removed her underwear.

I. When the victim girl and her Mousi (PW 1) came from Kalamboli to Mankhurd, the victim's mother was not at home, when the mother returned from her work in the evening, the victim girl told her about the incident and thereafter in the evening the victim's mother and Mousi took her to the doctors at Chitta Camp but the doctors refused to examine her.

It is necessary to be clarified that all these portions A to I appeared in the FIR of the victim girl, but according to her, she had not narrated these things to the police.

30. The alleged rape has taken place in the open passage adjoining to the community hall where the Ganapati idol was installed four days before. Since this is a rape case, it is necessary at the out set to find out as to what is the medical opinion. In that regard, the

prosecution has examined Dr.Vijay Kelwekar (PW-3) of Nagpada Police Hospital. The victim girl was examined by him on 12.9.97 at 3.00 p.m. [The rape is alleged to have taken place on 9th September 1997 in the evening after 5.30 p.m.]. P.W.3 - the doctor has stated that he examined her with her consent. The doctor noted the following things :-

a] Labia Majora : Normal

b] Labia Minora : Normal.

c] Clitoris : Not enlarged.

d] Vaginal Mucosa : Not seen.

e] Type of Hymen : Circular.

The Hymen orifice : Intact.

On left side of hymen anterior wall shows diffuse purple colour bruise. On left side wall Tenderness positive (present).

Hymenal Orifice - Admitted one little finger.

There is no injury to perineum.

Foreign body : Absent.

Sings of S.T.D. : Absent

No discharge.

Vaginal smear/Swab/Not made : washed parts after incident

Opinion after medical examination :-

"Findings of medical examination are consistent with the attempted sexual intercourse"

The doctor (PW 3) proved his report at Exhibit-14.

31. The following authorities were cited before us by the Mr.Mokashi.

1972 Cri L.J. 1260 (Rahim Beg vs. State of U.P.)

. It is the judgment of Supreme Court. It was a case where a girl of 10 or 12 years of age

was alleged to have been raped by a fully developed man. Hymen was intact. On male organs of the accused there were no injuries. There were two appeals of the two accused. The accused were convicted by the trial court and the conviction was maintained by High Court. The accused were actually sentenced to death by the trial Court and the High Court, because the girl was raped and then strangulated to death. In the post mortem, the following injuries were found on her body.

> Contusions on both sides of her face, neck, chest and the arms. Abrasions were also found on both her legs as well as on the neck. There was 1/2" long vertical tear which started from the lower portion of the junction of labia majora. Clotted blood was present on the margin while blood was present in the vagina. Hymen and vagina were found to be torn. Subcutaneous tissue of the neck portion was congested. Brain and membrances too were congested. Likewise, there was congestion in the larynx and the lungs. Hyoid bone was fractured. Forthy blood

> mucus was found in the lungs. Death was due to asphyxia as a result of pressing of the neck and the blockade in the passage of the mouth. According to doctor, the vaginal injuries were the the result of rape."

The Court adverted to the stains of human blood on the bush shirt of Mahadeo and the stain of semen on the Langot of Rahim Beg. Regarding the stain of semen, the Supreme Court held that Rahim Beg is a young man of 22. The Langot in question was dirty at the time it was taken into possession. The semen stain can exist because of a variety of reasons and would not necessarily connect with the offence of rape. Further, according to Dr.Katiyar, who had examined the girl and who had opined that if a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. No injury was, however, detected by the doctor on the male organ of any of the two accused. The absence of such injuries on the male organs of the accused would thus point to their innocence. The Supreme Court, therefore,

amongst other reasons, allowed the appeals, set aside the conviction and acquitted the accused.

(2003) 8 Supreme Court Cases 202 [State of Karnataka v/s. Mapilla P.P. Soopi]

. It was an appeal against acquittal of accused from offence of rape. Amongst other things, the Supreme Court found that, P.W.3 - the prosecutrix stated that immediately after the accused entered her house, she raised an alarm, but from the material produced by the prosecution, even though there were children and other adults nearabout the house of victim, none responded to the said alarm though witnesses examined by the prosecution show, they heard the alarm and by the time they went to the place of incident, they could only see the accused walking away.

. Learned advocate Mr.Mokashi, appearing for the accused in the present case, therefore, contended that, in the present case the victim girl accompanied by three of her friends and if that was so, the witnesses ran away seeing the

accused, because they were having belts in their hands. [This is the material contradiction or omission in the evidence of the victim girl, she has not stated so before the police]. There was no reason why the statement of those three boys were not recorded by the police and apart from that if the boys got frightened because of the presence of accused and they were rushing towards the prosecutrix, they would have reported the matter to somebody in the huge locality and, therefore, absence of witnesses is a strong circumstance in favour of the accused.

1994 Cri.L.J. 2810 [Balwan Singh v. State of Haryana]

. It was a case wherein prosecutrix was a girl of six years. She had gone with her father to the shop of accused, who was a cobbler, for getting the chappal repaired. The accused told the father that it would take time. In the mean time the father was called by somebody-else to another shop at a distance of 15 ft. The prosecutrix sat under a tree near the place where the accused was working. After 15 minutes the father and his friend heard shrieks of a child

coming from behind the shop of accused/appellant. They went there and saw that the appellant made prosecutrix to lie on the ground and was removing her underwear. Therefore according to them, the accused had tried to commit rape upon her. But when he saw two witnesses, he ran away. The accused was, therefore, prosecuted for attempt to commit rape. The trial Court convicted the accused. The High Court, however, found that the Manju - the victim girl had not specifically mentioned that the accused had taken off his Kachha. There was contradiction in the version given by the prosecutrix and her father and his friend in that regard. The High Court did not find any mark of injury on the person of prosecutrix. When she was made to lie down on the bare ground and the appellant/accused, who was strong man in his twenties, had attempted to commit rape on her, then the prosecutrix normally would be expected to receive some injury on her person particularly on her back. The High Court further observed that absence of any injury on the person of prosecutrix contradicts the version given by the father and his friend. The court also found that it would be difficult to believe that the appellant would attempt to commit rape

on the prosecutrix in the evening at about 5.15 p.m. when several people would be expected to be present in the near by two or three shops. The Court also observed that men may tell lie but circumstances won't. Then there was delay of five hours in lodging the FIR and this was considered fatal. The appeal was, therefore, allowed and the accused was acquitted.

. Mr.Mokashi the learned advocate appearing for the accused, in the present case, contended that the alleged gang rape in the present case had taken place in the open passage of community hall where Sarvajanik Ganapati festival was going on and Ganapati idol was installed four days back. It was a time of evening when people generally frequent such place for Darshan of Ganapati. It was surrounded by so many buildings and houses. Boys were used to play in the open place. Therefore, whether it would be possible that three persons would commit rape at such time and place. He also contended that excepting minor bruise on the private parts, as stated above, there were absolutely no injuries on the person of victim girl nor on the persons of any of the three accused and, therefore, according to

him, all this belies the prosecution case.

32. Learned APP Mrs.Mulekar on the other hand relied upon Modi's Medical Jurisprudence, page 303 wherein it is observed by the author thus :-

> "The hymen is situated more deeply in children than in nubile girls, and so it more often escapes injury in an attempted rape on children.
>
> Normally the hymen is ruptured by the first act of coitus, though it may persist even after frequent acts of coitus if it happens to be loose, folded and elastic, or thick, tough and fleshy."
>
> "in small children the hymen, being situated high up in the canal, is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia, or, if considerable violence is used, there is often laceration of the fourchette and perinaeum."

33. The learned APP Mrs.Mulekar further relied upon the following Judgments :-

(1998) 8 SCC 635 [Ranjit Hazarika v/s. State of Assam]

. In that case, prosecutrix was a young girl of 14 years of age. She was subjected to rape by the appellant. Her statement about rape has remained virtually unchallenged in the cross examination. Her statement has been corroborated by her mother and her father PW 2 and 3 respectively, to whom the prosecutrix immediately narrated the story. Their evidence was not challenged in the cross examination at all. However, the argument of accused was that medical evidence belies the story of prosecutrix because no injury was found on the private parts of the prosecutrix or her hymen was found to be intact. The opinion of doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. The Supreme Court found that the evidence of the prosecutrix inspires confidence. She had not stated anywhere

that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private parts. To constitute offence of rape, penetration, however slight, was sufficient. The Supreme Court also observed that the prosecution for sexual assault is a fact of crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated and, therefore, conviction was upheld and appeal was dismissed.

34. Mrs.Mulekar, the learned APP, also relied upon the judgment of the Supreme Court in the case of **Prithi Chand v/s. State of Himachala Pradesh,** reported in **(1989) 1 SCC 432.** In that case the victim was a girl of about 11 or 12 years of age. She had gone along with her two sisters to take a bath. While she was returning to her residence, the appellant met her on the way and asked her to permit him to have sexual intercourse with her. She refused. But the accused physically lifted her and took her to a shallow place and raped her. When the prosecutrix returned home, her trousers were

stained with blood. she narrated the incident to her mother. The mother and other ladies examined the victim girl and found that the vagina of the girl was ruptured and bleeding. The doctor examined her later on. The doctor found that there were abrasions on the lumbar region; inflammation around the vulva and the vagina was bleeding, the hymen was absent with the edges torn and there was tenderness all around. The hymen was bleeding on touch and the vagina admitted one finger with difficulty. The main contention of the accused was the if the vagina was admitted one finger with difficulty, then there could not be penetration. But this argument was negatived by the Court and the appeal was dismissed.

35. The next judgment relied upon by Mrs.Mulekar the learned APP for the State is in the case of **State of U.P. v/s. Babul Nath** reported in **(1994) 6 SCC 29**. In that case, the victim girl was aged about 5 years. Doctor found that the hymen was completely torn, laceration on all sides of vagina and fresh bleeding. The defence of accused was that these injuries could be caused in several ways other than sexual

assault. But that argument was turned down by the Supreme Court. In that case the Supreme Court also held that complete penetration was not necessary.

36. Mrs.Mulekar, learned APP, cited another judgment of the Supreme Court in the case of **Madan Gopal Kakkad v/s. Naval Dubey and another,** reported in **(1992) 3 SCC 204**. The girl, in that case, was 8 years old. She was examined five days after the incident. It was found that there was an abrasion on the medial side of labia majora and redness around labia minora with white discharge but hymen intact admitting tip of a little finger. The opinion of medical officer was that it was an attempt to commit rape. The trial Court acquitted the accused of the offence under Sec. 376 of the IPC. The State preferred appeal to the High Court. The High Court convicted the accused under Section 354 of the Indian Penal Code. It was the father of victim girl who went to the Supreme Court. The Supreme Court found that the medical officer, who examined the victim, was an inexperienced medical officer and, therefore, expert's opinion, which is of an advisory nature, was not accepted by

Court. Partial penetration was quite sufficient to constitute the offence under Section 376 and, then the accused was convicted under Section 376 of the Indian Penal Code by the Supreme Court.

37. Another judgment that was cited by the learned APP Mr.Mulekar is in the case of **Madan Lal v/s. State of J & K.** reported in **(1997) 7 SCC 677**. In that case the accused was Head Master of a school and was charged for attempt to commit rape under Sections 376/511 upon the prosecutrix, who was the student of same school. Detailed report of the incident was given by the prosecutrix (PW 18). The mother corroborated about disclosure made to her. She was examined by gynaecologist (PW 21). She opined that no definite opinion could be given regarding the attempt of sexual intercourse. She stated in her evidence that the hymen was intact and small penetration in case of girl of 13 years could rupture as well as injure the hymen. The trial Court acquitted the accused. The High Court convicted the accused under Section 376 read with 511 and sentenced them to R.I. for five years. The evidence of prosecutrix was seriously challenged with reference to that of doctor. But

the Supreme court found that the judgment of the High Court did not require interference. The submission was also made before the Supreme Court that at the most it could be an offence under Section 354 but that was rejected by the Supreme Court. Because, the Supreme Court found that if the evidence of prosecutrix is to be believed, then it was a case of attempt to rape.

38. On the face of aforesaid judgments, the learned APP Mrs.Mulekar contended that the injuries to the rupture of hymen is not sine qua non for the offence of rape. She contended that finding of bruise on left side of hymen anterior wall is sufficient to come to conclusion that this was a case of rape.

39. As against this, Mr.Mokashi, the learned advocate for the accused, repeatedly urged and contended that it has to be remembered that this is not a case by an individual but it is a case of gang rape by three accused all are well built as against the victim girl and when the doctor, who himself examined the prosecutrix, has admitted or stated in his evidence that if a girl of 10 to 12 years of age is raped by a man of

18-20 years of age, the injuries which are possible are as follows :-

1. Hymen rupture.

2. Bleeding through the hymenal tear

3. If it is rape by force then there will be tears in perinium.

4. Gait will be broader and there will be pain.

5. It may be that labia majora will be swollen.

And if such a girl is raped by three persons, the injuries would be much more than the above. But the doctor categorically admitted that no injury of the above nature was present. Learned advocate Mr.Mokashi for the accused, therefore, contended that even if as per the judgment of the Supreme Court, relied upon by the learned APP, rupture of hymen was not necessary in every case of rape, absence of all other injures as stated by the doctor clearly went against the

prosecutrix's story of gang rape. He contended that no inference of rape or gang rape could be drawn only because of small bruise noted by the doctor on left side of hymen anterior wall .

. Mr.Mokashi seriously urged that even if a person or persons decide to commit rape, they would not have chosen such a place and such a time for doing so. According to him, unless the accused are insane, they would not have chosen time and place as is alleged by the prosecution.

40. The learned APP Mrs.Mulekar, as against these submission of learned advocate Mr.Mokashi, tried to contend that the story of rape gets corroboration from the following facts :-

(A) The victim girl 'X' has stated that after the incident she went home. On the next day, PW.1 Savita - the maternal aunt of victim girl 'X' came to their house. The victim girl went to Kalamboli. On 11th September 97, the victim girl came back to her house at Mankhurd with her maternal aunt Savita (PW 1). From there, along with her mother, all of them went

to the hospital and on her way to the hospital, the victim girl ‘X’ told about the incident.

(B) Then victim girl ‘X’ was taken municipal hospital at Trombay. The doctor checked her up but did not tell anything. In the evening at 5.30 p.m. the maternal aunt of victim girl again came. The victim girl was taken to another hospital in the evening. The doctor told them that it was a police case and they came to police station at Trombay. Then F.I.R. was lodged. On the next day morning the victim girl ‘X’ was sent to Nagpada Police Hospital where doctor examined her, as stated above.

41. The learned APP Mrs.Mulekar contended that all this evidence of victim girl gets corroboration from the evidence of P.W.1 Savita; from the evidence of her mother (PW.6) and from the evidence of doctors who have examined by the prosecution. P.W.1 Savita has stated in this regard that the incident took place on 9.9.1997. She came to know about it in the night of 10.9.97

at Kalamboli. On that day, she had gone to the house of victim girl. The mother of victim girl told her that victim girl was not eating anything and not talking to anybody and that she was sleeping quietly and, that since victim girl had fever, her mother gave her paracetamol. Therefore, P.W.1 Savita took victim girl 'X' to her house at Kalamboli where the victim girl was asked repeatedly. But the victim girl told that she had stomach pain and, therefore, she was not eating. The victim girl also told that while passing urine, she got burning sensation. P.W.1 Savita therefore examined her and found that her stomach portion below navel was fully red and it was swollen. PW.1 asked victim girl how it had happened. But victim girl told her that it was an injury by stone and ultimately the victim girl told her that she was raped by three accused.

42. Then according to P.W.1, in the morning she came back to the house of victim girl and she told about this incident to the mother of victim girl. Thereafter, they went to the Municipal Hospital, where the victim girl was examined. But the doctor told them that it was a police case and refused to give medicines. P.W.1

further stated that in the evening the victim girl was taken to private doctor. Even there, the doctor told them that this was a police case and, therefore, did not treat the victim girl. Then all of them returned home and then went to the police station where the incident was narrated.

43. The learned APP contended that this story of the victim girl and P.W.1 is further corroborated by the mother of victim girl. P.W.6 - the mother of victim girl has stated that on 9.9.97 the victim girl came back to the house at 8 p.m.. She was crying. The mother asked her for food. But the victim girl had little food and had high fever. The mother gave her paracetamol. But she was still crying. When mother asked what is the matter, the victim girl told that she had difficulty in passing urine and had burning sensation. The mother tried to examine her private part, but the victim girl did not allow to do that. The mother told her to apply some ointment soframycine to her private part. The victim girl did accordingly. Next day, the mother forced victim girl to go to school and the mother dropped her to half way to

the school. The mother returned home at 2.30 p.m. At that time the victim girl was crying. In the evening P.W.1 came. The mother told P.W.1 about the behaviour of the victim girl. P.W.1 took the victim girl to Kalamboli. On 11.9.97 both of them returned and then P.W.1 told the mother that three boys had gang raped the victim girl. P.W.6 further stated that then the victim girl was taken to hospital. But they were informed that it was a police case and that they would not examine the victim girl. This was on 11.9.97. Then in the evening, the victim girl was taken to private doctor by name Dr.Shivani at Chembur. The doctor did not examine the victim girl because it was the police case nor give any medicine and, then at about 8 p.m. on 11.9.97 they went to the police station and lodged the complaint.

44. The learned APP contended that this may be a case, where there was a delay in lodging the FIR. But this is not a case where the victim girl and her maternal aunt or the mother were totally silent of all these three days i.e. from 9.9.97 till 12.9.97 when the victim girl was examined by the doctor at Nagpada Police

Hospital. The learned APP contended that the prosecution examined P.W.4 Dr.Jyoti Atre who has stated that in 1997 she was working as a doctor in Chitta Camp Municipal Dispensary near Trombay Police Station and on 11.9.97 at about 10.30 to 10.45 a.m. the sister and the daughter of P.W.6 working as a Community Health volunteer came to Dr.Sharmila. Then Dr.Sharmila called this Dr.Jyoti and told that the girl complained about fever and abdominal pain and had difficulty in passing urine for the last two days. Dr.Sharmila told Dr.Jyoti that P.W.6 was a regular patient. They were told to examine the girl as rape was committed on the girl. Dr.Sharmila got little scared and asked Dr.Jyoti to look into the matter. Then Dr.Jyoti persuaded the victim girl. She told about the rape by three persons and gave names of the accused.

45. Dr.Jyoti then told Dr.Sharmila that this was medicolegal case and they should not examine the victim girl and accordingly they were advised.

46. The learned APP therefore contended that when P.W.1 and P.W.6 had taken care to take the

victim girl to the doctor at Municipal Dispensary, Dr. Jyoti and when the victim girl had stated about the rape to the said Dr.Jyoti then it cannot be said that the prosecutrix and her relatives did not do anything during this period. In the evidence of P.W.Nos.1 and 6, there are many contradictions and omissions. But looking to their limited role, those contradictions and omissions can be disregarded. Their limited role is, so far P.W.1 is concerned, the victim girl had narrated the incident to her with the names of accused. Then P.W.1, in turn, narrated it to the mother of victim girl and both of them took the victim girl to Dr.Jyoti. About immediate narration there may be some differences in timing of narration to both, but the fact remains that the victim girl was having pain in the abdomen continuously, she was having fever, she was not eating and crying is proved by these two witnesses. This intervening action of taking the victim girl to the doctors dilutes the effect of delay in lodging the FIR.

47. It is true, as noted by us, that so far as victim girl is concerned, there are major and material contradictions and omission. The first

major contradiction was in respect of the manner of rape. As per the story in the FIR, the victim girl was raped while she was made to lie down on the ground and as per the story in the court, she was raped while she was standing. We have also noted many lacunae in the prosecution case and in the investigation regarding non- examination of the friends of the victim girl to corroborate her story. The place of rape being the varandha in the Community Hall where the Ganapati idol was installed during Ganapati Festival and it was 4th day. The time was evening when the people generally frequent such places during festival. However, the subsequent conduct of the victim girl, her maternal aunt and the mother of victim girl and, the examination of victim girl by the doctor during intervening period before loding the FIR do prove that she was subjected to physical force and violence by these accused.

48. Apart from this, the important thing is the medical evidence. We have reproduced the findings of the doctor so far as victim girl is concerned. The doctor found that, excepting minor bruise on left side of hymen anterior wall,

there was absolutely no injury on the body of victim girl. No discharge was found. No injuries were found on the person of any of the accused coupled with the fact that the evidence of the doctor is that if a rape is committed upon a girl of such age, the injuries would be of following type.

1. Hymen rupture.

2. Bleeding through the hymenal tear

3. If it is rape by force then there will be tears in perinium.

4. Gait will be broaden and there will be pain.

5. It may be that labia majora will be swollen.

and if it is a gang rape, then the injuries would be more aggravated in nature. Since there are no injuries of this type and since the prosecution case is of rape by three persons, the only

conclusion that can be drawn is that it was a case of attempt to commit rape only. This is the same opinion given by doctor as, "The findings of Medical Examination are consistent with the attempted sexual intercourse." When the medical evidence is consistent with the injuries found and when the other circumstances are also consistent with this story, then conviction of the accused for gang rape under Section 376 2(g) cannot be upheld.

49. Mr.Mokashi, the learned advocate appearing for the accused, has also argued that when the mother (PW 6) had stated that she had given soframycin to victim girl when she had pain in her stomach and had difficulty in passing urine and when the victim girl applied the soframycin to her private part, such minor bruise is possible by finger of victim girl herself. We are not in agreement with this argument. However, simple bruise on the body of the victim, as noted above, is definitely not indicative of rape in any case of gang rape by three persons whose age and built as deposed to by Dr.Kelwekar (PW 3) do not support the theory of rape. Dr.Kelwekar (PW 3) has stated in his evidence in

this regard.

Accused No.1 Vijay Pralhad Varbhuvan :-
Built and Nutrition : Height : 5’ 6" Weight : 61 kgs. No injury on his body.

Accused No.2 Amitesh Subhash Rai :-
Height : 5‘ 8", Weight : 50 Kgs. No injury on his body.

Accused No.3 : Anand Omprakash Sharma :-
Height : 5’ 1". Weight : 47 kgs. No injury on his body.

As compared to this, the victim girl was 4‘ 6" in height and 29 kgs in weight. Therefore, if three persons of this built committed rape one after the other upon victim girl, then, as stated by the doctor, there would have been more serious injuries on her person. But apart from single bruise on left side of hymen anterior wall, there was no injury on her body nor any injury was found on the person of any of the accused. No semen discharge was found on her body also. The trial Court found that the evidence of P.W.3 is wholly reliable but in the entire discussion of

the evidence of P.W.3, right from para 254 to 285, the trial Court did not give any importance to the opinion of the doctor regarding the nature of injuries which are possible if a girl of 10 to 12 years of age is raped only once by a man of 18 to 20 years of age, [All those We have been reproduced twice in the judgment], though in para 265, the trial Court has reproduced that part of evidence. There is absolutely no discussion about the evidence of this doctor, nor the prosecution re-examined the doctor to challenge his opinion about the aforesaid nature of injuries which a girl may receive if she is raped by a man and that the injury would be more serious and grave if she was forcibly raped by three persons in succession.

50. One more important aspect of the matter that requires to be repeated here is that the victim girl was a convent [i.e. English Medium School] going girl. She had shown courage to show to the trial Court her position at the time of rape. She was very much candid and clear enough to admit in Court that she understood her body portions properly and she knew that the toilet portion of the body and bath room portion

of the body are different. But she repeatedly stated that act of rape was committed with toilet portion of her body. Admittedly, this is not a case under Section 377 of the Indian Penal Code. Giving maximum latitude to the victim girl and looking to the entire case and the single injury on her private part, as noted above, this cannot be a case of gang rape. It is at the most a case of attempt to commit rape.

51. The Supreme Court in the case of **Madan Lal v/s. State of J & K** reported in **(1997) 7 SCC 677**, as stated above, in para 12 has made the following observations :-

> "The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her lie flat on the ground undresses himself and then forcibly rubs his erected penis on the

> private parts of the girl but fails to penetrate the same into the vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with Section 511 IPC. In the facts and circumstances of the present case the offence of an attempt to commit rape by the accused has been clearly established and the High Court rightly convicted him under Section 376 read with Section 511 IPC."

In that case the High Court convicted the accused under Section 376 read with Section 511 IPC and that conviction was upheld by the Supreme Court.

52. In this case the victim girl (PW 2) does not at all say any kind of ejaculation by any of the accused on her body or on her private parts. No semen was found on the clothes of any of the accused. At least nothing was brought to our notice in this regard. And, therefore, considering all these circumstances mentioned above including the place of alleged rape i.e.

the verandha of the Community Hall, the time of alleged rape i.e. going on of Ganapati festival and Ganapati idol was installed four days back, it is difficult to believe that all the three accused would have succeeded in committing rape upon the victim girl one after the other. Consequently, this case has to be held as a case for attempt to commit rape under Section 376 read with Section 511, IPC.

53. The trial Court held all the accused guilty under Sections 363, 366 and 376 (2)(g) of the Indian Penal Code and they were convicted for seven years, ten years and life imprisonment respectively for the aforesaid offences, in addition to payment of fine of Rs.10,000/- each or in default to undergo further imprisonment for two years. Punishment prescribed for the offence under Section 376 (2)(g) is rigorous imprisonment for a term which shall not be less than ten years but which may be for life and also fine. It also provides that the court may, for adequate and special reasons impose a sentence of imprisonment of either description for a term of less than ten years. So far Section 363 is concerned, maximum punishment is seven years. So far Section 366 is

concerned, punishment is ten years and fine. For the offence coming under Section 511, the punishment prescribed by law is, imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine as is provided for the offence or with both.

54. In our opinion, ten years imprisonment for the offence under Section 376 read with Section 511 IPC would be sufficient to meet the ends of justice. Sentence of seven years and ten years awarded by the trial Court to the accused under sections 363 and 366 is required to be maintained. We, therefore, pass the following order :-

:ORDER:

Criminal Appeal No.629 of 2001 filed by Accused No.1 Vijay Pralhad Warbuvan, Criminal Appeal No.630 of 2001 filed by Accused No.2 Amteesh Subashchandra Rai and Criminal Appeal No.631 of 2001 filed

by Accused No.3 Anand Omprakash Sharma, are partly allowed.

Conviction of all the accused under Sections 363 and 366, IPC, and the sentence imposed by the trial Court under those Sections is maintained as it is.

Conviction of all the accused under Section 376 (2)(g) IPC is set aside and all the accused are convicted under Section 376 read with Section 511 of IPC and sentenced to undergo imprisonment for ten years with fine of Rs.5000/- each, in default of payment of fine to undergo further imprisonment for one year. Period of sentence already undergone to be counted.

All substantive sentences to run concurrently.

Criminal Application No.5847 of 2005, for bail filed by Accused No.2 Amteesh, does not survive in view of the aforesaid order. It is disposed of accordingly.

[D.G.DESHPANDE,J]

[SMT.R.S.DALVI, J]